SAMSURI BIN SAAD & ANOR.

v.

CHEW KIT TOH T/A KIT THONG WOH HUP & ANOTHER APPEAL

HIGH COURT MALAYA, KUALA KANGSAR
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CIVIL APPEAL NO: 12-24-93 (T)]
8 FEBRUARY 1995

TORT: *Road accident - Trial Judge making findings of fact - Trial Judge apportioning liability equally between the parties - Appeal against liability and quantum - Whether appellate Court can interfere - Consideration of the principles applicable.*

TORT: *Fatal road accident involving motorcycle - Claim by parents of deceased rider and pillion - Liability for accident apportioned equally between defendant and deceased rider - Whether parents of deceased rider and pillion can recover 100% against defendant - Consideration of the conflicting decisions in Veronica Joseph & Anor. v. Tu Kon Lin & Anor. and Lim Chai Oon & Anor. v. Normah bt. Ismail.*

CIVIL PROCEDURE: *Appeal - Appeal against decision of trial Judge - Preliminary objection - Memorandum of appeal not served - Memorandum of appeal incorporated in record of appeal - Breach of O. 55 r. 2 Rules of the High Court 1980 - Effect - Whether breach curable under O. 2 r. 1 of the Rules of the High Court 1980.*

Both these appeals were heard together as they arose out of the same accident involving the same vehicles and the same parties. In Civil Appeal No: 12-25-93(T) the respondents raised a preliminary objection to the effect that there was a breach of O. 55 r. 2 of the Rules of the High Court 1980 in that the memorandum of appeal was never served but instead was incorporated in the record of appeal and formed part and parcel of the record of appeal.

Civil Appeal No: 12-24-93(T) was a claim by the parents of the deceased rider of the motorcycle and the pillion who sustained serious injuries. The respondent was absent throughout the trial and the learned Sessions Court Judge made findings of fact based on the evidence of the second appellant/ pillion and the investigating officer. In the event the learned Judge apportioned liability equally between the deceased and the respondent. The question that arose on appeal was whether there were grounds for interfering with the decision of the learned Sessions Court Judge.

The further question that arose was whether the pillion was entitled to recover 100% against the respondent when the learned Judge had found that both the deceased rider of the motorcycle and the driver of the motorlorry were equally

blameworthy. In this regard the Court considered the contrary decisions in *Veronica Joseph* and *Lim Chai Oon.*

Held:

[1] An appellate Court should not interfere with the findings of the trial Court who had the opportunity of seeing and hearing the witnesses and who made findings thereon on the apportionment of blame between the parties in a road accident. These principles of law when applied to the present case could only mean that the apportionment of liability on equal basis between the parties was correctly arrived at by the learned Sessions Court Judge.

[2] On the question of quantum of damages, an appellate Court will not substitute its own figure simply because they disagree with the figures arrived at by the trial Judge. It is only when the trial Judge has acted on a wrong principle of law or has misapprehended the facts or made a wrong estimate of the damage suffered that the appellate Court would be entitled to interfere. However in the present case the learned trial Judge considered all the authorities that were advanced before her, and taking into consideration previous awards for similar injuries, the awards given by the learned Sessions Court Judge were fair and reasonable.

[3] The decision in *Veronica Joseph's* case is preferable to the one in *Lim Chai Oon.* This was because the first appellant was not at fault and he has no share of the responsibility for the blame and, consequently, he is entitled to 100% damages. As for the second appelant, on the authority of *Reliance Omnibus Co. Sdn. Bhd. & Anor. v. Ishak bin Mohd. Jaafar & Anor.* and *Oli Mohamad v. Keith Murphy & Anor.* it was clear that he was entitled to recover 100% against the respondent.

[4] Applying the cases of *Shobri bin Hassan* and *Siang Galau* it was clear that there was substance in the preliminary objection advanced by Counsel for the respondents in Civil Appeal No: 12-25-93(T). In the circumstances the appeal was of necessity dismissed with costs without the need to go into the merits of the appeal.

[Appeals in regard to liability and quantum of damages dismissed with costs].

Cases referred to:

Shobri bin Hassan v. R.S. Ramalingam a/l Subramaniam [1993] 3 CLJ 70 ***(foll)***
Siang Galau v. Ang Wak Hiong [1994] 1 CLJ 82 ***(foll)***
Lew Voon Kong & Anor. v. Mustaffa bin Kamis [1978] 2 MLJ 217 FC ***(refd)***
Siti Aisha bt. Ibrahim v. Goh Cheng Hwai [1982] 2 MLJ 124 FC ***(refd)***
Miskinah bte Jaya & Ors. v. Mohamed bin Salleh & Anor. [1984] 1 MLJ 187 ***(refd)***
Mohamed Salleh bin Awang & Anor. v. Low Han Leong & Anor. [1982] 1 MLJ 82 FC ***(refd)***

Jeremiah v. Lee Yew Kwai [1966] 1 MLJ 59 ***(refd)***
Uval & Anor. v. Zainal [1970] 1 MLJ 74 ***(refd)***
Bong Nyi Moi v. Narayanasamy & Anor. [1973] 1 MLJ 250 ***(refd)***
Lim Joo Chiang v. Lim Siew Choo & Anor. [1955] MLJ 201 PC ***(refd)***
Amar Singh v. Chin Kiew [1960] MLJ 77 ***(refd)***
Topaiwah v. Salleh [1968] 1 MLJ 284 ***(refd)***
Veronica Joseph (f), an infant, & Anor. (by Cyril Augustus Joseph, their next friend) v. Tu Kon Lin & Anor. [1987] 1 CLJ 81 ***(foll)***
Lim Chai Oon & Anor. v. Normah bt Ismail (Widow) suing on behalf of herself and seven minors as dependants of Fadzin bin Abu & Anor. [1994] CLJ JT 18, [1994] 2 CLJ 783 ***(not foll)***
Reliance Omnibus Co. Sdn. Bhd. & Anor. v. Ishak bin Mohd. Jaafar & Anor. [1993] 4 CLJ 291 ***(foll)***
Oli Mohamed v. Keith Murphy & Anor. [1969] 2 MLJ 244 ***(foll)***

Legislation referred to:
Civil Law Act 1956, s. 7
Civil Law Act, 1956 (Revised 1972), s. 12(4)
Rules of the High Court 1980, O. 2 r. 1, O. 55 r. 2

For the appellant - Su Ching, M/s. Gurdev, Dalgit, Su & Co.
For the respondent - Saiful Bahari bin Hj. Omar, M/s. Ruslan & Zamani.

JUDGMENT

Abdul Malik Ishak J:

Both these two appeals were heard together as agreed between both parties. It is patently clear from the appeal records that these two appeals arose out of the same accident involving the same vehicles and the same parties.

At the outset, Madam Su Ching, the learned Counsel for both the respondents in Civil Appeal No: 12-25-93(T), raised a preliminary objection to the effect that the memorandum of appeal was never served on them but instead they were incorporated in the record of appeal and formed part and parcel of the record of appeal contrary to O. 55, r. 2 of the Rules of the High Court, 1980 ("RHC"). Encik Saiful Bahari bin Haji Omar, the learned Counsel for the appellants in Civil Appeal No: 12-25-93(T), resisted and argued that an irregularity of this nature was curable under O. 2, r. 1 of the RHC. Madam Su Ching informed the Court that she took the liberty of informing the appellants of her intention to raise the preliminary objection by way of an oral notice and this was effected forty-eight hours (48) before this appeal came up for hearing. She argued that ample notice had been provided and yet there was no application filed by the appellants for enlargement of time. Even though Encik Saiful Bahari bin Hj. Omar admitted that the oral notice adverted to by Madam Su Ching was relayed to them, yet he fashioned his arguments on the inherent jurisdiction of this Court to enlarge time, notwithstanding that there was no formal application, and he urged this Court to allow the appeal to

proceed on its merits. I need to refer to two authorities that would sufficiently dispose of the preliminary objection. First, it is the case of *Shobri bin Hasan v. R.S. Ramalingam a/l Subramaniam* [1993] 3 CLJ 70; [1993] 1 AMR 16: 636; and [1993] 1 MLJ 263 where the Court there held that (see the headnote from [1993] 3 CLJ 70):

> (1) The memorandum of appeal does not form part of the appeal record. The memorandum of appeal must be filed separately within 14 days after the service on the appellant's solicitor, of the notes of evidence and the grounds of judgment by the Subordinate Courts and served on the respondent.
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> (2) As the memorandum of appeal was not filed within the prescribed time, and no sufficient ground is shown for the delay (Order 55 r. 4(3) of the Rules of the High Court, 1980) and as there is no application for enlargement of time to file the memorandum of appeal, the preliminary objection stands.

Secondly, it is the case of *Siang Galau v. Ang Wak Hiong* [1994] 1 CLJ 82 where Chong Siew Fai J (now Chief Judge, Sabah and Sarawak) applied the same principles as enunciated in *Shobri's* case (*supra*) and consequently, his Lordship there then proceeded to dismiss the appeal with costs. Applying these two authorities to the present appeal, I am impelled to hold that there was substance in the preliminary objection as advanced by Madam Su Ching and, accordingly, I dismissed the appeal in regard to the Civil Appeal No: 12-25-93(T) forthwith with costs without the need to go into the merits of the appeal.

Now, in regard to Civil Appeal No: 12-24-93(T), the learned Sessions Court Judge proceeded to hold that both the deceased rider of motorcycle KS 5917 (Osman bin Samsuri) and the respondents as the driver of motorlorry ABG 8794 were equally liable. But notwithstanding that both the parties were held equally liable, the learned Sessions Court Judge ordered that the respondents were held liable to pay, as far as the quantum was concerned, 100% to the appellants and this must be the sore point that the respondents kept in their hearts. I shall revert to this part later.

Hereinafter, all references to the parties would relate and be confined to Civil Appeal No: 12-24-93(T).

This was a dependency claim under s. 7 of the Civil Law Act, 1956 by the first appellant and his wife, Bedah bte Abdullah, for the death of their son by the name of Osman bin Samsuri (hereinafter referred to as the "deceased') in a road accident that took place on 7 May 1991 at about 2.30 p.m. at k.m. 65, along the stretch of Ipoh - Penang road. The second appellant who rode pillion on that motorcycle sustained serious injuries, pain and suffering together with the antecedent losses. It is pertinent to point out that the learned Sessions Court Judge in her written judgment had amply considered the issues of liability and quantum generally.

The second appellant and the investigating officer of the case gave evidence and it was through them that the jigsaw puzzle as to how the accident could have taken place was pieced together. The respondents were absent throughout the trial and it is obvious that the learned Sessions Court Judge relied heavily on the evidences of the second appellant and the investigating officer of the case.

The second appellant testified that he rode pillion on that motorcycle which was ridden by the deceased from the direction of Ipoh towards Taiping and they were using the stretch of the old main road from Ipoh to Penang (not the PLUS highway). As they approached k.m. 65, near to the Bukit Berapit area, suddenly a motor lorry came from the opposite direction, encroached into their path and collided into the motorcycle that was still in motion then. That motorlorry was none other than the motorlorry driven by the respondents. The second appellant further testified that the motorcycle was travelling along that stretch about 2 feet away from the side of the road; and that when the motorlorry encroached into the path of the motorcycle the distance between these two vehicles were approximately 10 meters. It is germane, at this juncture, to mention that the appellants in their pleadings categorically alleged encroachment by the respondents. This certainly augurs well for the appellants. The particulars of negligence against the driver of the motorlorry at paragraph 'f' alleged in cogent terms: "memasuk atau melintas laluan pihak plaintif" *(Lew Voon Kong & Anor. v. Mustaffa bin Kamis* [1978] 2 MLJ 217 FC; *Siti Aisha bt Ibrahim v. Goh Cheng Hwai* [1982] 2 MLJ 124 FC and *Miskinah bte Jaya & Ors. v. Mohamed bin Salleh & Anor.* [1984] 1 MLJ 187). Reverting back to the facts of the case, the second appelllant testified that the deceased could not avoid the collision as the "tembok terowong sempit." Indeed looking at the photographs at page 27 B, C - the narrowness of the "terowong" can really be appreciated (see the additional record of appeal). Under cross-examination, the second appellant testified that, at the material. time, the motorcycle was going down the slope while the motorlorry was on its way up the slope and that the accident occurred after bypassing the "tembok terowong."

The investigating officer testified as to the condition of the road at k.m. 65, Jalan lpoh to Pulau Pinang stretch at the old main road. He testified that if one travels from Ipoh one would go down the slope and negotiate the curves. He testified that at the scene there were scratch marks at "J" as reflected in the sketch plan.

The learned Sessions Court Judge relied on the silent evidences which took the forms of the rough sketch plan and the key together with the photographs in order to assess the liability of the parties. These silent evidences were used as barometers by the learned Sessions Court Judge, apart from relying on the testimonies of the second appellant and the investigating officer of the case, to draw inferences as to who was in fact liable *(Mohamed Salleh bin Awang*

a *& Anor. v. Low Han Leong & Anor.* [1982] 1 MLJ 82 FC). This was a perfectly legitimate exercise.

There were several findings of facts by the learned Sessions Court Judge and for convenience it can be summarised as follows:

b (1) she noted the scratch mark at "J" as reflected in the sketch plan and she concluded that that scratch mark which started almost near to the centre white line must have been the point of impact of the two vehicles. And here if one were to trace backwards from point "J" following the same line of the scratch mark, the point of impact would be nearer to the centre double white line.

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(2) she stated that since it was not disputed that the deceased was travelling down the slope and at a speed of 15 to 25 miles per hour down that slope, she concluded that the deceased might not be able to control his motorcycle - all the more so as there was a pillion rider with him. Given this scenario, she concluded that as the deceased rode that motorcycle down the slope *d* and while negotiating the right turning he lost control of his motorcycle which caused his motorcycle to glance off the motorlorry (tergesel) which was, at that time, travelling near to the centre white line. The impact must have caused the motorcycle to lurch forward as it was descending down the slope and this must have caused the scratch mark that appeared on the road as reflected at "J". She concluded that this was the probable cause *e* of the accident in view of the absence of broken glasses on the road.

(3) she surmised further that since the motorlorry was ascending the slope it must have travelled slowly as compared to the motorcycle that went down the slope. Based on these facts, she concluded that it was more probable *f* that the deceased must have sped whilst going downhill and negotiating the right turning and, in so doing, the motorcycle came into contact with the motorlorry in a glancing blow.

(4) finally, she concluded that the accident would not have happened had both parties been more cautious. She put liablity equally on the shoulders of *g* the deceased and the driver of the motorlorry for manoeuvring the vehicles too close to the centre of the road nearer to the centre double white line.

Confronted with these findings of facts by the learned Sessions Court Judge, I am reluctant to interfere on the apportionment of liability as it was purely a question of deciding what was the right apportionment of the blame between *h* the deceased as the rider of that motorcycle and the driver of the motorlorry when they were involved in a road accident (*Jeremiah v. Lee Yew Kwai* [1966] 1 MLJ 59). It is now trite that in an appellate capacity, I must be slow to interfere with the apportionment of blame as I am fully satisfied that there was no error of law or of fact in the impeccable judgment of the learned *i* Sessions Court Judge *(Uval & Anor. v. Zainal* [1970] 1 MLJ 74). It has been said that an appellate Court should not interfere with the findings of the trial Court who had the opportunity of seeing and hearing the witnesses and

who made, in the context of the present appeal, her findings thereon (*Bong Nyi Moi v. Narayanasamy & Anor.* [1973] 1 MLJ 250). These principles of law when applied to the present appeal would mean only one thing. The apportionment of liability on equal basis between the parties was correctly arrived at by the learned Sessions Court Judge and it is now left for me to confirm it and I so do.

On the question of quantum of damages, on the authority of *Lim Joo Chiang v. Lim Siew Choo & Anor.* [1955] MLJ 201 PC, an appellate Court will not interfere simply because the figures awarded by the trial Judge was greater or less than that which the appellate Court would itself have awarded. Put differently, quantifying damages is solely a matter of opinion or of impression that varies from one individual to another. In all cases, differences of calculation or assessment are to be expected and are, indeed, common place. That would be the sum total of judicial discretion. Consequently, an appellate Court will not substitute its own figure simply because they disagree with the figures arrived at by the trial Judge. It is only when the trial Judge had acted on a wrong principle of law or has misapprehended the facts or made a wrong estimate of the damage suffered would the appellate Court be entitled to interfere. None of these appear to be apparent in the judgment of the learned Sessions Court Judge (see *Amar Singh v. Chin Kiew* [1960] MLJ 77, 79 and *Topaiwah v. Salleh* [1968] 1 MLJ 284 for a good treatment of the subject matter). In my judgment, the awards given are fair and reasonable considering previous awards for similar injuries. The learned Sessions Court Judge considered all the authorities that were advanced before her and came to those figures correctly and I am not inclined to interfere. But that is not the end of the matter. It was argued before me that the second appellant as the pillion rider was not entitled to recover 100% against the respondents as the learned Sessions Court Judge had found that both the deceased rider of the motorcycle and the driver of the motorlorry were equally blameworthy. It was argued that the decision of Wan Yahya J (now FCJ) in *Veronica Joseph (f), an infant & Anor. (by Cyril Augustus Joseph, their Next Friend) v. Tu Kon Lin & Anor.* [1987] 1 CLJ 81 was no longer good law in view of the decision of James Foong J in *Lim Chai Oon & Anor. v. Normah bt Ismail (Widow) Suing on Behalf of Herself And Seven Minors As Dependants of Fadzin bin Abu & Anor.* [1994] CLJ JT 81; [1994] 2 CLJ 783. I have, in regard to an innocent third party, the pillion rider, like the second appellant here observed in (1) *Reliance Omnibus Co. Sdn. Bhd.* (2) *Arunasalam a/l Ramiah v.* (1) *Ishak bin Mohd. Jaafar* (2) *Hamidah binti Ishak* [1993] 4 CLJ 291; [1993] MMD (Nov.) 1108 and [1993] 3 AMR Supp. Rep. 1093 to the effect that:

> As regards the second respondent/plaintiff, an innocent third party (a pillion rider), she is entitled, in my considered view, to recover the whole of the damages in this case. It is sufficient for her to prove negligence against the second appellant/defendant even if it is not the whole of the negligence. She is entitled to recover the whole of the damages (100%) awarded by the trial Court

notwithstanding my judgment in the instant appeal that the first respondent/plaintiff and the second appellant/defendant were equally neg1igent. It is her prerogative whether to recover the whole of the damages (100%) against the appellants/defendants or against the first respondent/plaintiff (see *Oli Mohamed v. Keith Murphy & Anor.* [1969] 2 MLJ 244 and *Wong Fook @ Wong Fong & Anor. v. Abdul Shukor bin Abdul Halim & Anor.* [1990] 2 CLJ 382). On the other hand, the first respondent/plaintiff is entitled to recover partly from his own insurance company and partly from the second appellant/defendant for the damages incurred by him.

In *Oli Mohamed v. Keith Murphy & Anor. (supra),* Choor Singh J dealt with the right of an innocent third party to recover damages in this way:

Counsel for the second defendant submitted that if the Court holds that both defendants were equally negligent, then the judgment against the second defendant should be only for 50 per cent of the total sum assessed as damages in this case. In my opinion this submission also fails. It is clear law that if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage. See *Dingle v. Associated Newspapers Ltd.* [1961] 2 QB 162 and *Drinkwater v. Kimber* [1932] 2 QB 281. In *Dingle's* case, Devlin LJ said at page 188:

... Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or, have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law ...

That would be the right of the second appellant in so far as the quantum goes. Would the position be the same for the first appellant whose son - the deceased, had died in the road accident and that the first appellant now proceed to claim on a dependency claim under s. 7 of the Civil Law Act, 1956?

Bluntly put, would the first appellant be entitled to 100% damages just like the second appellant even though the deceased (the first appellant's late son) was found 50% negligent? Wan Yahya J (now FCJ) in *Veronica Joseph*

(supra) held the view that the claimants there were entitled to 100% damages notwithstanding that the deceased there was 20% liable. The headnote of *Veronica Joseph (supra)* reads as follows:

> Held
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> (1) Considering the circumstances and the evidence of the case, the deceased was liable to 20% contributory negligence.
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> (2) In a claim for, dependency, the sum awarded to the plaintiffs can be reduced in proportion to the contributory negligence, but this will only apply where the action was brought for the benefit of the estate under s. 8 of the Act and not under s. 7 as in the present case.

His Lordship Wan Yahya J (now FCJ) said this in *Veronica Joseph (supra)* at page 88:

> The claimants in our present case, are the children; the contributory negligence was that of their mother. They have not been at fault themselves and therefore have no share of the responsibility for the damages. Their claim is for damages suffered as dependents and they cannot be classified as persons who have suffered damages 'as a result partly of their own fault' within the meaning of s. 12(1) of the Civil Law Act, 1956.

James Foong J took an opposite view and in *Lim Chai Oon's* case *(supra)* he differentiated *Veronica Joseph's case (supra)* and was of the view that since s. 12(4) of the Civil Law Act, 1956 (Revised 1972) states that in an action brought by a dependent under s. 7 of the Act, damages recoverable by the dependent shall be reduced proportionately to the extent of the deceased's fault in the accident, namely, 50%.

It is wrong to say that *Lim Chai Oon's* case *(supra)* overruled *Veronica Joseph's* case *(supra)* as both these two cases were decided by the High Courts of concurrent jurisdictions. For my part, I prefer *Veronica Joseph (supra).* The reason is simple. The first appellant was not at fault and he has no share of the responsibility for the blame and, consequently, he too is entitled to 100% damages.

For the reasons adumbrated above, I dismissed the appeals in regard to the liability and the quantum of damages as arrived at by the learned Sessions Court Judge with costs.